

MAY 31 1996

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No. 95-1767

**In The  
SUPREME COURT OF THE UNITED STATES  
October Term, 1996**

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UTAH WOMEN'S CLINIC, INC.; EDWARD R. WATSON,  
M.D.; MADHURI SHAH, M.D.; LAUREL SHEPHERD, M.D.;  
ALISSA PORTER; WENDY EDWARDS; WASATCH  
WOMEN'S CENTER, P.C.; WILLIAM R. ADAMS, M.D.;  
DENISE DEFA; and SARAH ROE, on behalf of herself and all  
other similarly situated women from Utah and surrounding  
states,

*Petitioners,*

v.

MICHAEL LEAVITT, Governor of the State of Utah, in his  
individual and official capacities; JAN GRAHAM, Attorney  
General of the State of Utah, in her individual and official  
capacities; and their successors,

*Respondents.*

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**On Petition for a Writ of Certiorari  
to the United States Court of  
Appeals for the Tenth Circuit**

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**BRIEF IN OPPOSITION**

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## **QUESTION PRESENTED**

Is the time to appeal a final judgment on the merits tolled by a motion for reconsideration of an interlocutory order finding liability for attorney fees and costs, but not establishing the amounts to be awarded?

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MICHAEL LEAVITT, et al., Respondents.

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Governor Michael Leavitt and Attorney General Jan Graham respectfully request that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

**STATEMENT OF THE CASE**

Plaintiffs brought this action challenging the Utah Abortion Act Revision, S. B. No. 60. Judge Benson entered his opinion and order dismissing the action on February 3, 1994. In the last sentence of this opinion and order, the trial court also found the plaintiffs to be liable for the defendants' attorney fees under 42 U.S.C. § 1988. While the opinion and order was final as to the dismissal of the plaintiffs' action on



the merits, it was only interlocutory as to the collateral issue of the defendants' costs and attorney fees. The amount of costs and attorney fees to be awarded was not decided.

Judgment was entered for the defendants, dismissing this action on the merits on February 3, 1994. On February 14, 1994, the plaintiffs filed a motion asking the trial court to reconsider its decision imposing liability on the plaintiffs for the defendants' attorney fees. This motion was styled a motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. The motion did not challenge the district court's decision on the merits of the action in any manner. The only issue addressed in the motion was the collateral issue of attorney fees.

The plaintiffs' motion was denied by the trial court and a judgment on the attorney fees question was entered on July 15, 1994. The plaintiffs' notice of appeal was filed on July 18, 1994, seeking to challenge the February 3, 1994 judgment on the merits and the trial court's award of attorney fees. An amended notice of appeal was filed by the plaintiffs on July 22, 1994 to include the judgment for attorney fees in the appeal.

The United States Court of Appeals for the Tenth Circuit held that a motion to delete a trial court's award of costs and attorney fees did not toll the time period for appealing the merits of the underlying case. *Utah Women's Clinic, Inc. v. Leavitt*, 75 F.3d 564 (10th Cir. 1995).

## **REASONS FOR DENYING THE PETITION**

### **THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FOLLOWED THIS COURT'S CONTROLLING PRECEDENT AND ITS DECISION DOES NOT CONFLICT WITH DECISIONS OF THE OTHER COURTS OF APPEAL**

The United States Court of Appeals for the Tenth Circuit dismissed as untimely that portion of the plaintiffs' appeal that sought to review the trial court's decision to dismiss the plaintiffs' complaint on the merits. The court correctly determined that the ongoing litigation over whether the defendants were entitled to recover their attorney fees and costs did not preclude the judgment entered on the merits from being final. Because the plaintiffs did not file a timely notice of appeal from the dismissal of their action on the merits, the United States Court of Appeals for the Tenth Circuit correctly dismissed that portion of the appeal on the grounds that the court was without jurisdiction to consider it.

In their petition for a writ of certiorari, plaintiffs erroneously treat the final judgment on the merits as being a final judgment on the question of attorney fees and costs as well. Final judgment on the merits of this action was entered in favor of the defendants on February 4, 1994. That judgment stated:

that judgment be entered in favor of the defendants and the plaintiffs' cause of action is dismissed with prejudice. Because of the absence of merit in support of plaintiffs' case and the legal frivolousness of plaintiffs'

assertions in this facial challenge, plaintiffs are ordered to pay defendants' costs and attorneys fees.

While this judgment was final as to the merits, the decision as to the defendants' costs and attorney fees was not. The amount of costs and attorney fees to be awarded was still to be determined.

In *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988), this Court explained that a final decision for jurisdiction purposes pursuant to 28 U.S.C. § 1291 "generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." (Quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). Even a short glance at the challenged judgment demonstrates that it is not a final order as to attorney fees.

Plaintiffs' Fed. R. Civ. P. 59(e) motion to alter or amend the judgment did not challenge the final judgment as to the merits, but only asked the trial court to reconsider its interlocutory order regarding fees and costs. This motion did not effect the finality of the trial court's final judgment on the merits.

The United States Court of Appeals for the Tenth Circuit correctly followed the decisions of this Court that have stated that an outstanding question of attorney fees and costs under section 1988, or otherwise, is a collateral issue and does not bar recognition of a merits judgment as being final and appealable. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175-76 (1989); *Budinich*, 486 U.S. at 202-3; *Buchanan v. Stanships, Inc.*, 485 U.S. 1130, 1131-32 (1988);

*White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451-53 (1982); *Browder v. Director, Illinois Dep't of Corrections*, 434 U.S. 257 (1978).

This Court has adopted a "bright-line rule" holding "that an unresolved issue of attorney's fees for the litigation in question does not prevent the judgment on the merits from being final." *Budinich*, 486 U.S. at 202. This Court has repeatedly considered the issue of attorney fees and costs to be collateral to the main cause of action. *Osterneck*, 489 U.S. at 175-76; *Budinich*, 486 U.S. at 199-201; *Buchanan*, 485 U.S. 268-69; *White*, 455 U.S. at 450-51; *Browder*, 434 U.S. at 451.

The United States Court of Appeals for the Tenth Circuit correctly applied these precedents to the facts of the present action.

Plaintiffs' Rule 59(e) motion and memorandum could not be any clearer regarding the relief requested: deletion of the award of attorney's fees and costs before those fees and costs were settled in further proceedings. Aplt. App. 1001, 1033. Plaintiffs argue that their Rule 59(e) motion questioned the correctness of the February decisions insofar as attorney's fees are concerned; however, that does not change the fact that costs and attorney's fees normally are collateral to the merits judgment, particularly when the judgment contemplates significant further proceedings concerning costs and attorney's fees. Therefore, a Rule 59(e)



motion, challenging only the award of costs and attorney's fees, does not toll the time for a merits appeal. The Supreme Court has created a uniform rule; regardless of the statutory or decisional law which authorizes the award and despite claims that fee matters are part of the merits. *Budinich*, 486 U.S. at 201-02. As a lower federal court, we are not free to disregard this uniform rule.

*Utah Women's Clinic, Inc., v. Leavitt*, 75 F.3d 564, 567 (10th Cir. 1995).

The United States Court of Appeals for the Tenth Circuit correctly pointed out that the plaintiffs' motion did not ask the trial court to reconsider its decision to dismiss their action. The only claim raised by the plaintiffs was their belief that the defendants should not be awarded fees and costs in this matter. But attorney fees and costs are collateral legal issues to which Rule 59(e) was never meant to apply. *White*, 455 U.S. at 451.

Plaintiffs err in stating that the challenged decision is in conflict with the prior decisions of this Court. This court has repeatedly held that questions of attorney fees and costs are collateral in nature. The decision of the United States Court of Appeals for the Tenth Circuit expressly follows the law established by this Court. Indeed, the rule of law that the plaintiffs urge this Court to accept would be contrary to the prior decisions of this Court. This Court has sought to create a "bright-line" test in this area as to what decisions are final and appealable. But in this action, while the decision on the merits was final, the decision on the question of attorney fees

was only interlocutory. The amount of fees and costs to be awarded had yet to be determined. To accept the position of the plaintiffs would be to state that the ongoing litigation on the collateral issue of fees and costs was capable of stopping the judgment on the merits from being final. This result would directly conflict with the result urged by this Court and would lead to results in direct conflict with the "bright-line" test this Court has sought to establish.

Plaintiffs claim that the decision of the United States Court of Appeals for the Tenth Circuit is contrary to the decisions of this Court is based, in part, on their theory that those decisions apply only to original motions for fees and costs, and not to ongoing litigation on such matters. This limitation, urged by the plaintiffs, is contradictory to this Court's efforts to establish a "bright-line" test. Instead, plaintiffs would create a double standard. If the final judgment on the merits of an action could be interpreted in some manner to have either granted or denied a request for costs and fees, then the judgment on the merits must remain a hostage of the ongoing litigation concerning these collateral matters. Only if the request for fees and costs was clearly made after the entry of the final judgment on the merits would the "bright-line" test adopted by this Court apply. Defendants respectfully submit that the United States Court of Appeals for the Tenth Circuit has properly interpreted and followed the intentions of this Court.

Plaintiffs also claim that the United States Court of Appeals for the Tenth Circuit's decision in this action is contrary to this Court's decision in *Osterneck*. In reaching this conclusion, the plaintiffs claim that an award of attorney fees that requires the court to examine and consider the



merits of an action (in determining the liability for and amount of the award) should be treated the same as the prejudgment interest at question in *Osterneck*. Plaintiffs claim that such an attorney fees question is no longer to be considered collateral to the merits.

But this Court once again affirmed that questions of attorney fees are always collateral to the decision on the merits in *Osterneck*. 489 U.S. at 174-76. Plaintiffs' theory that certain attorney fees issues are part of the merits decision of an action is contrary to *Osterneck* and its reliance on this Court's decision in *Budinich*. In *Budinich*, this Court stated:

This practical approach to the matter suggests that what is of importance here is not preservation of conceptual consistency in the status of a particular fee authorization as "merits" or "nonmerits," but rather preservation of operational consistency and predictability in the overall application of § 1291. This requires, we think, a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final.

....

In short, no interest pertinent to § 1291 is served by according different treatment to attorney's fees deemed part of the merits recovery; and a significant interest is disserved. The time of appealability, having jurisdictional consequences, should above all be clear. We are not inclined to adopt a disposition that requires the merits or

nonmerits status of each attorney's fee provision to be clearly established before the time to appeal can be clearly known. Courts and litigants are best served by the bright-line rule, which accords with traditional understanding, that a decision on the merits is a "final decision" for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case.

*Budinich*, 486 U.S. at 202-3.

If the plaintiffs' theory were to be accepted, all attorney fees questions brought pursuant to § 1988 would become part of the merits judgment. The merits must be considered in determining whether the applicant was the prevailing party. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The court must consider the merits of the action in determining the number of hours that were reasonably expended in litigating the matter. 461 U.S. at 433-34. The quality of the prevailing party's victory must be assessed as well in determining what would be an appropriate fee award. 461 U.S. at 434-36. The attorney fees question at issue in this action cannot be distinguished from all other attorney fees claims made under § 1988.

Plaintiffs also claim that the United States Court of Appeals for the Tenth Circuit's decision is contrary to decisions reached by three other United States Circuit Courts of Appeal. Plaintiffs' reliance on *Samuels v. American Motor Sales Corp.*, 909 F.2d 573 (7th Cir. 1992) is misplaced. *Samuels* involved a motion for attorney fees that was

incorrectly styled a Rule 59(e) motion. The United States Court of Appeals for the Seventh Circuit expressly stated that the question of whether or not the rule was applicable to such a request for fees was immaterial. *Id.* at 577. The question actually before the Seventh Circuit was neither the propriety of the original request for fees nor the decision on the merits, but rather the correctness of the trial court's decisions concerning later motions challenging the trial court's decision on the original request for fees. *Id.* at 577-78.

The other two decisions relied upon by the plaintiffs both involved judgments that were not just final as to the merits of the actions, but were final judgments as to the issues of costs and fees as well. *Ramsey v. Colonial Life Ins. Co. of America*, 12 F.3d 472 (5th Cir. 1994); *Penland v. Warren County Jail*, 759 F.2d 524 (6th Cir. 1985). Plaintiffs correctly state that these two decisions held that Rule 59(e) applies to post-judgment motions asking a court to reconsider its final determination on a fees request. But plaintiffs fail to note that the courts limited their decisions in those two cases so as to apply only in circumstances where the trial court's final decision on the merits and its final decision denying fees and costs were combined. The United States Court of Appeals for the Tenth Circuit, in distinguishing *Ramsey*, stated that:

We do not think that *Ramsey* was meant to apply where the Rule 59(e) motion is directed to a merits judgment *awarding* both attorney's fees and costs which will be quantified at some future date. *Ramsey* pertains to a rule 59(e) motion where the judgment was final not only as to the merits, but also as to

attorney's fees. 12 F.3d at 473-74. Unlike this case, the judgment incorporating the denial of attorney's fees contemplated no further proceedings. Here, the Rule 59(e) motion questioned *liability* for attorney's fees and costs which had not been set, significant further proceedings were essential on these collateral matters, and Plaintiffs apparently recognized the collateral nature of these issues when they sought to take a separate appeal.

75 F.3d at 568 (emphasis in original).

As the United States Court of Appeals for the Tenth Circuit's decision noted, *Ramsey* expressly limited its holding to circumstances where the motion asked the trial court to reconsider a final judgment that denied the award of attorney fees. 12 F.3d at 477. *Ramsey* thereby distinguished a line of United States Court of Appeals for the Fifth Circuit precedent that supports the decision of the Tenth Circuit in this matter, where the question of an award of fees and costs was ongoing and had not been reduced to a final judgment.

One of those prior decisions was *Campbell v. Bowlin*, 724 F.2d 484 (5th Cir. 1984). *Campbell* held that a motion to supplement the amount of fees awarded to the defendants in the final judgment on the merits could not be considered a Rule 59(e) motion, and therefore did not preclude the plaintiffs from filing a notice of appeal as to the merits.

If an award of attorneys' fees is collateral to the judgment on the merits, then the time at which they are awarded is immaterial;

whether awarded at the same time judgment is entered or four months later, they are still collateral to the main cause of action.

Therefore, even if the defendants' post-judgment motion could be seen as altering the original award of attorneys' fees, that would not prevent Campbell from proceeding with an appeal of the judgment on the merits.

724 F.2d at 488.

The decision of the United States Court of Appeals for the Tenth Circuit correctly determined that the plaintiffs' motion, that addressed only the collateral issue of attorney fees, did not alter the finality of the trial court's judgment on the merits of this action. In reaching this decision, the Tenth Circuit followed the rationale behind this Court's decisions on this issue.

This rationale does not contemplate a different result if, instead of the defendants, the plaintiff had sought to alter the original award of attorney's fees to defendants. The merits judgment was final and appealable.

Regardless of which side prevails, civil rights actions invariably spawn disputes over attorney's fees; these disputes should not delay the appeal of the merits.

75 F.3d at 568-69.. Plaintiffs have failed to demonstrate any grounds upon which this Court should grant their petition for a writ of certiorari and their petition should therefore be denied.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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